UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARCIA WILLIAMS and KAREN WUNZ, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, Defendant.	)	Case No. 18-cv-370 **BRIEF IN SUPPORT OF THE NATIONAL LABOR RELATIONS BOARD'S MOTION TO DISMISS**

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BRIEF IN SUPPORT OF THE NATIONAL LABOR RELATIONS BOARD'S MOTION TO DISMISS

Since 1935, Congress has charged the National Labor Relations Board ("NLRB") with resolving questions of representation under Section 9 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159. Pursuant to that mandate, the NLRB's Region 6 in Pittsburgh, Pennsylvania was responsible for initially processing a decertification petition filed by Plaintiffs Marcia Williams and Karen Wunz ("Williams and Wunz"), seeking an election concerning whether the union, General Teamsters Local 397 a/w International Brotherhood of Teamsters, AFL-CIO ("Local 397"), should continue as the employees' exclusive bargaining representative. After an investigation, the Regional Director for Region 6 dismissed the decertification petition, a decision the Board upheld on review.[1]

[1] References to "the Board" refer specifically to the five-member administrative body created by 29 U.S.C. § 153(a); references to the "NLRB" refer to the agency as a whole.
A Regional Director performs two roles: representing the Board in representation proceedings, and representing the NLRB's General Counsel in investigating and prosecuting unfair labor practice cases. *See* 29 C.F.R. § § 102.15, 102.60-102.63. These roles are consistent with the structure of the NLRA.

Williams and Wunz filed the instant Complaint charging that the NLRB violated the NLRA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, when the Regional Director allegedly refused to investigate Williams' decertification petition and then applied the Board's "settlement bar," a long-standing, Board-created doctrine, to dismiss the petition. [Complaint: Doc. 1[2], ¶¶ 34-41, 46-53]. Pursuant to this doctrine, when an employer enters into an unfair labor practice settlement agreement containing a requirement to bargain in good faith, the NLRB will not process decertification petitions for "a reasonable period of time," so that the parties may establish a productive bargaining relationship insulated from outside interference. *See Poole Foundry & Mach. Co.*, 95 NLRB 34, *enf'd,* 192 F.2d 740 (4th Cir. 1951). According to Williams and Wunz, the settlement bar itself violates the NLRA, as well as the separation of powers and nondelegation doctrines [Doc. 1, ¶¶ 28-33, 42-45, 54-60]. Williams and Wunz allege (incorrectly, as explained below in Section II) that the NLRB dismissed the petition without investigating it, which they contend deprived them of due process. [Doc. 1, ¶¶ 61-65]. Their Complaint seeks both declaratory and injunctive relief. [Doc. 1, pp.11-12].

Williams and Wunz's allegations do not give rise to subject matter jurisdiction in this Court and are without merit. The crux of this case is that Congress intentionally withheld from district courts the power to interfere with or review representation proceedings conducted by the NLRB. Despite fervent disagreement with the decisions of the Regional Director and the Board, Williams and Wunz have provided no basis for this Court to assert subject matter jurisdiction because the exceedingly narrow exception to non-reviewability has not been met where the Board has not violated any "clear and mandatory" provision of the NLRA. *NLRB v. Interstate*

[2] The pages or paragraphs of the Complaint in this action will be cited to as [Doc. 1, p. – or ¶--]; and the exhibits to the Complaint will be cited to as [Doc. 1-2, p. --].

Dress Carriers, Inc., 610 F.2d 99, 115 (3d Cir. 1979) ("*Interstate Dress Carriers*") (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)). Accordingly, the Complaint should be dismissed.

STATUTORY BACKGROUND

The NLRB has two principal functions—to determine, through representation proceedings, whether employees desire to be represented for collective bargaining purposes, 29 U.S.C. § 159, and to adjudicate unfair labor practice cases prosecuted by the General Counsel, 29 U.S.C. § 153(d), 160.[3]

It is the Board's representation case processing that is primarily at issue in this case. Section 9 of the NLRA provides only the barest outline for the conduct of representation proceedings. 29 U.S.C. § 159. Instead, the Supreme Court has consistently emphasized that Congress "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). As the Court explained long ago in *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940), "[t]he control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *See also Inland Empire Dist. Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 706 (1945) ("Obviously great latitude concerning procedural details is contemplated."). This "great latitude" granted to the Board in processing election proceedings was recently reaffirmed by the Fifth Circuit when it upheld recent changes the Board made to its election procedures. *Assoc. Builders & Contractors of Texas Inc. v. NLRB*, 826 F.3d 215, 220-23 (5th Cir. 2016).

[3] An unfair labor practice is committed if an employer or union violates an employee's rights to organize, engage in other protected concerted activities, or refrain from such activities within the meaning of Section 7 of the NLRA, 29 U.S.C. § 157. *See* 29 U.S.C. § 158.

Pursuant to these procedures, an election proceeding begins by the filing of "a petition for investigation of a question concerning representation" of employees who wish to be represented for the purposes of collective bargaining (a "certification petition") or who wish *not* to be represented by the incumbent representative (a "decertification petition"). 29 C.F.R. § 102.60(a). Once such a petition has been filed, the Regional Director must investigate whether there is reasonable cause to believe that a question concerning representation exists.[4] 29 U.S.C. §159(c)(1); 29 C.F.R. § 102.63(a)(1); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 180 (D.D.C. 2015). Section 9 does not instruct how that investigation must take place.

If the Regional Director determines that there is reasonable cause to believe a question concerning representation exists, the Regional Director "shall provide for an appropriate hearing upon due notice." *See* 29 U.S.C. § 159(c)(1). The Regional Director then issues a Notice of Hearing and the employer and representative, or prospective representative, must submit Statements of Position. 29 C.F.R. § 102.63(a)(1). If a hearing occurs, the Regional Director determines whether a question concerning representation actually exists. If it does, an election must be held. If it does not, the petition must be dismissed. *See* 29 U.S.C. § 159(c)(1).

If, however, the initial investigation reveals that there is a valid statutory or Board-created bar to an election, then no question concerning representation exists. The statutory example of such bars is contained in 29 U.S.C. § 159(c)(3), which prohibits an election if a valid election was held in the preceding twelve-month period. The Board has created other bars to the processing of an election petition to protect the integrity of election proceedings. *See Seven Up Bottling Co.*, 222 NLRB 278, 278-79 (1976) (finding no question concerning representation

[4] The NLRA permits the Board to delegate its representational functions to its regional directors, 29 U.S.C. § 153(b), which the Board has done since 1961, *see* Delegation of Authority, 26 Fed. Reg. 3911, 3911 (May 4, 1961).

existed when a valid certification occurred within the prior 12-month period, i.e., the "certification bar"); *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1007 (1958) (finding no question concerning representation existed during the life of a collective bargaining agreement not to exceed three years, i.e., the "contract bar"); *United States Coal & Coke Co.*, 3 NLRB 398, 399 (1937) (election petition will not be processed when an unfair labor practice charge is pending if the charge alleges conduct that would interfere with employee free choice to vote for or against a union, i.e., the "blocking charge policy"). This is consistent with its congressionally-granted discretion in running election proceedings, and courts repeatedly have approved the use of these bars (*see below* at pp. 16-17).

At issue in this case is the "settlement bar," which was created in *Poole Foundry & Mach. Co.*, 95 NLRB 34 (1951). There, in return for a union's withdrawal of unfair labor practice charges, an employer entered into a settlement agreement requiring it to bargain in good faith with the union. *Id*. at 34. During the initial period of bargaining, the employees filed a decertification petition, and the employer notified the union that it would not continue bargaining until the union furnished proof of its majority status. *Id*. The region dismissed the decertification petition, and the Board upheld the dismissal. *Id*. When the employer continued to refuse to bargain, the union filed more unfair labor practice charges. *Id*. at 35. Finding that the employer violated the NLRA in refusing to bargain with the union, the Board held that the settlement agreement's bargaining provision "must be given a reasonable time to operate, irrespective of any possible or proved loss of Union majority during such reasonable period." *Poole Foundry & Mach. Co.*, 192 F.2d at 742 (finding three and one-half months not a "reasonable time"); *see also Truserv Corp.*, 349 NLRB 227, 227 (2007) (holding that a decertification petition may not be processed when it is filed after the execution of the settlement of an unfair labor practice charge).

As the Board recently affirmed, "a question of representation cannot exist under the [NLRA] if there is a bar to an election." Representation-Case Procedures, 79 Fed. Reg. 74307, 74381 (Dec. 15, 2014) (to be codified at 29 C.F.R. pt. 101-103). And as described above, under Section 9 of the NLRA, once the NLRB determines that no question concerning representation exists, there is no need for a hearing. *See* 29 U.S.C. § 159(c)(1); *cf. Gebhardt-Vogel Tanning Co.*, 154 NLRB 913, 915 (1965) (finding a hearing unnecessary when there was no question of representation affecting commerce). Instead, the election petition must be dismissed.

If a party is dissatisfied with the Regional Director's decision, it may file a request for review with the Board. 29 C.F.R. § 102.67(b). If granted, the Board will review the Regional Director's decision and issue its own decision. If the request for review is denied, the Regional Director's decision becomes the NLRB's "last word." As shown below (at pp. 10-11), because neither the Regional Director's decision nor the Board's is a final order subject to direct judicial review, the representation proceeding will only become reviewable when it is the basis of an unfair labor practice case. 29 U.S.C. § 159(d).[5]

PROCEDURAL HISTORY

On May 8, 2018, Williams and Wunz, employees of Krise Transportation, Inc. ("Krise"), filed a decertification petition with the NLRB's Region 6, alleging that Local 397 no longer possessed majority support of the employees. [Doc. 1-2, p. 9]. The Regional Director issued a

[5] In unfair labor practice cases, the General Counsel investigates charges that employers or unions have violated the NLRA. See 29 U.S.C. §§ 158, 160. If the General Counsel issues complaint, and the case continues to formal adjudication, a hearing is conducted before an administrative law judge, who issues a decision that is subject to review by the Board. 29 C.F.R §§ 101.10-101.11. Ultimately, in such cases, the Board issues a decision and order, constituting the final agency determination. 29 U.S.C. § 160 (b), (c). It is only that "final order of the Board" that is reviewable in an appropriate federal court of appeals pursuant to Section 10(e) and (f) of the NLRA. 29 U.S.C. § 160(e), (f).

Notice of Representation Hearing, and, in accordance with Section 102.63(b) of the Board's Rules and Regulations, required Krise and Local 397 to submit Statement of Position forms. [Doc. 1-2, pp. 11-25]. In its statement, Local 397 objected to the decertification petition, arguing that the election was barred by a provision in an NLRB-approved settlement agreement between Krise and Local 397. [Doc. 1-2, p. 27].

That settlement agreement was the resolution of an unfair labor practice charge that Local 397 filed against Krise in a separate case in 2017. After investigating, the Regional Director found that charge meritorious and issued a complaint and notice of hearing. Rather than litigate the unfair labor practice case, Krise and Local 397 entered into a settlement agreement, which the Regional Director approved on March 9, 2018, [Doc. 1-2], containing the following language:

> EXTENSION OF BARGAINING OBLIGATION -- The Charged Party agrees to bargain in good faith with the Union, on request, as the recognized bargaining representative in the appropriate unit. The Union's status as the exclusive collective bargaining representative may not be challenged for a period of 12-months from the date that the parties have their first bargaining session.

[Doc. 1-2, pp. 4, 27].

After reviewing Local 397's Statement of Position, the Regional Director, pursuant to her authority under 29 C.F.R. § 102.63(a)(1), issued an Order Withdrawing Notice of Representation Hearing. [Doc. 1-2, pp. 27-28]. The Regional Director determined that the issue of whether the settlement agreement barred the Board from processing the decertification petition would be best addressed by the parties' briefing the issue in response to an Order to Show Cause. [Doc. 1-2, pp. 30-34].

On June 26, 2018, upon review of the briefs, the Regional Director issued an Order Dismissing Petition. [Doc. 1-2, pp. 36-44]. The Regional Director dismissed the petition because

of the existence of a settlement bar and because "an election cannot be held when unfair labor practices have not been fully remedied." [Doc. 1-2, p. 40]. The Regional Director found that settlement bar began to run on April 6, 2018—the date of the parties' first bargaining session—and the decertification petition had been filed only one month later, which was 11 months short of the period proscribed by the settlement agreement and not a reasonable amount of time for good faith bargaining. [Doc. 1-2, pp. 38, 40-41]. Williams and Wunz then filed a request for review with the Board [Doc. 1-2, pp. 46-61], which the Board denied on October 9, 2018 [Doc. 1-2, p. 63]. In a footnote in the Board's Order, Members Kaplan and Emanuel noted their willingness "to revisit[] the Board's settlement bar policy in a future appropriate proceeding" but declined to do so in this case because a reasonable period time for bargaining had not elapsed. [*Id*.] Members Kaplan and Emanuel affirmed that, here, "the settlement agreement only bars the employees from exercising their Section 7 right of free choice for a reasonable period of time." [*Id*.]

On November 27, 2018, Williams and Wunz filed the instant Complaint for Declaratory and Injunctive Relief.

ARGUMENT

Federal Rule of Civil Procedure 12 requires district courts to dismiss complaints that lack subject matter jurisdiction and even permits courts to do so sua sponte. Fed. R. Civ. P. 12(b)(1), (h)(3). This is because federal courts are courts of limited jurisdiction, possessing "only that power authorized by the Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction," which places the burden on the party asserting jurisdiction to establish it. *Id*.; *see also Kehr*

Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). For the reasons explained below, Williams and Wunz cannot meet their burden and their Complaint should be dismissed.

I. Board Representation Proceedings are Generally Not Reviewable in District Court

When Congress vested the NLRB with exclusive jurisdiction over representation cases, it did not provide for direct judicial review. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77, 481-82 (1964); *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409, 411 (1940) ("*AFL*"); *Interstate Dress Carriers, Inc.*, 610 F.2d at 105 (finding NLRA "include[s] no express provision for immediate judicial review of a representation decision"); *see also Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1310 (D.C. Cir. 1984) ("The cases are legion holding that, as a general rule, Board orders emanating from representation proceedings are not directly reviewable in court.").

Instead, Congress made the deliberate decision to allow review of representation decisions *only* by an appropriate court of appeals and *only* if a subsequent unfair labor practice proceeding results in a final Board order. *Interstate Dress Carriers*, 610 F.2d at 105; *Physicians Nat. House Staff Ass'n v. Fanning*, 642 F.2d 492, 495 (D.C. Cir. 1980) ("Board orders in representation proceedings have long been held to be unreviewable unless they become the subject of unfair labor practice orders under section 10 of the Act."). The reason for this scheme of indirect review is that Congress was concerned that elections be conducted expeditiously, and accordingly chose to defer judicial review of representation case decisions. *See Boire*, 376 U.S. at 476-79 (discussing Congress's concern that delay would result in a waning of employee support for collective bargaining).

When Congress does not expressly authorize judicial review, the legislative history of the statute at issue becomes "highly relevant in determining whether judicial review may be

nonetheless supplied." *Switchmen's Union of North Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943). In reviewing the NLRA, the Senate determined that,

> Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election . . . But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts in the manner provided in Section 10 . . . . This provides a complete guarantee against arbitrary action by the Board.

Interstate Dress Carriers, 610 F.2d at 105-06 quoting S. Rep. No. 972, 74th Cong., 1st Sess. 14 (1935). Courts have thus found that the "Congressional purpose was unmistakable." *Id*. at 105; *see also AFL*, 308 U.S. at 411 (discussing House and Senate reports). In *AFL*, the Supreme Court ruled that the plain statutory language demonstrates an intent to limit judicial review of representation proceedings only to those proceedings that form the basis of unfair labor practice cases. 308 U.S. at 409-12. Even though this indirect method of review "imposes significant delays on attempts to challenge the validity of Board orders in certification proceedings," the Supreme Court found it "obvious that Congress explicitly intended to impose precisely such delays," *Boire*, 376 U.S. at 477-78, a policy decision that binds the courts, *Califano v. Sanders*, 430 U.S. 99, 108 (1977).

As a result, "some Board decisions in representation proceedings may evade all judicial review. Nevertheless, [Congress] has rejected attempts to provide review in such cases." *Physicians Nat. House Staff Ass'n*, 642 F.2d at 499. Indeed, when Congress passed the Taft-Hartley Act in 1947, it considered a proposed amendment to the NLRA that would have allowed immediate review of Board certification decisions. *See* H.R. Rep. No. 80-245, at 43 (1947) (noting that the proposal would have permitted "any person interested to appeal from a certification"), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations

Act, 1947, at 334 (1948). However, the proposed amendment was eliminated in conference as it "would permit dilatory tactics in representation proceedings." 93 Cong. Rec. 6602 (daily ed. June 5, 1947) (statement by Senator Taft, architect of the Taft-Hartley Act), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 1542 (1948).

As the court in *Nat'l Mar. Union v. NLRB*, explained regarding this lack of judicial review:

> We are convinced, however, from our analysis of the controlling legislation and its history, that Congress intended to so limit the role of the courts when it drafted the carefully circumscribed review provisions of the Act. It may well be that the occasional injustice which results from this statutory scheme is too high a price to pay for expediting the vast majority of representation elections . . . . But, as Mr. Justice (later Chief Justice) Stone concluded more than thirty years ago, 'these are arguments to be addressed to Congress and not the courts.'

375 F. Supp. 421, 438–39 (E.D. Pa.) (quoting *AFL*, 308 U.S. at 411-12) *aff'd*, 506 F.2d 1052 (3d Cir. 1974). Thus, this Court may not review the Board's decision in the representation proceeding at issue, unless an extraordinary exception to non-reviewability is warranted.

II. This Case Does Not Fall Within the Extraordinary *Leedom v. Kyne* Exception to Non-Reviewability

In *Kyne*, the Supreme Court created a very narrow exception to the non-reviewability of representation cases, 358 U.S. at 190-91. There, the Board directed a representation election in a bargaining unit comprised of professional and non-professional employees without first having "a majority of such professional employees vote for inclusion in such unit," as expressly required by Subsection 9(b)(1) of the NLRA. *Id*. at 184. The Board admitted the violation but argued that the district court lacked jurisdiction to review the Board's decision. *Id*. at 187.

But the Supreme Court held that the suit was "not one to 'review' . . . a decision of the Board made within in its jurisdiction. Rather [the suit] is one to strike down an order of the

Board made in excess of its delegated powers and contrary to a specific prohibition in the [NLRA]." *Id*. at 188. Because Subsection 9(b)(1) imposed a "clear and mandatory" statutory duty on the Board, the district court had jurisdiction to set aside the Board's exercise of a power that Congress specifically withheld from the Board. *Id.* at 188-89.

Under *Kyne* then, federal district courts have jurisdiction to intervene in Board proceedings only in extremely unusual circumstances. A "plaintiff must show, *first*, that the agency has acted 'in excess of its delegated powers and contrary to a specific prohibition' which 'is clear and mandatory,' and *second*, that barring review by the district court 'would wholly deprive [the party] of a meaningful and adequate means of vindicating its statutory rights.'" *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (quoting *Kyne*, 358 U.S. at 188, and *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) ("*MCorp*")). Both prerequisites must be met before the district court has jurisdiction to review the Board's decision. *See, e.g., MCorp*, 502 U.S. at 43-44.

As the Third Circuit discussed in rejecting a challenge to the Board's application of the contract bar:

> The *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

Confederated Indep. Unions v. Rockwell-Standard Co., 465 F.2d 1137, 1141 (3d Cir. 1972) (quoting *Boire*, 376 U.S. at 481). Given the narrowness of the *Kyne* exception, jurisdiction is not conferred on the district courts to consider an alleged abuse of discretion. *See Bays v. Miller*, 524 F.2d 631, 633 (9th Cir. 1975). Nor is jurisdiction conferred on the district courts to consider the "wisdom of a particular Board policy[,]" for "*Kyne* and [*Boire v.*] *Greyhound* teach us that

disagreement with the Board on a matter of policy or statutory interpretation is not a sufficient basis for assumption of jurisdiction." *Nat'l Mar. Union*, 375 F. Supp. at 434.

Instead, a party attempting to invoke a district court's jurisdiction must make, at the very least, a "plain" showing that "the Board's action was an attempted exercise of a power specifically withheld by the Act." *Firestone Tire & Rubber Co. v. Samoff*, 365 F.2d 625, 628 (3d Cir. 1966). There must be a "strong and clear" showing that the Board disregarded a "clear, specific and mandatory provision of the [NLRA]." *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968) (quoting *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 706 (D.C. Cir. 1965)); *see Bakery, Confectionery & Tobacco Workers' Int'l Union, Local 6 v. NLRB*, 799 F. Supp. 507, 510 (E.D. Pa. 1992). In fact, the party must show that the agency's action is "manifestly beyond the realm of its delegated authority," *S. Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418, 1424 (6th Cir. 1994), or that the action is "blatantly lawless," *Abercrombie v. Office of Comptroller of Currency*, 833 F.2d 672, 675 (7th Cir. 1987). For the reasons described below, Williams and Wunz cannot make such a showing in this case.

A. Williams and Wunz Have Failed to Demonstrate that the Board Has Acted Contrary to Section 9(c), Much Less that Such Alleged Violation is "Strong and Clear"

Williams and Wunz attempt to overcome this mountain of case law by asserting that the Board has violated the NLRA in this case. Specifically, Williams and Wunz allege that the settlement bar doctrine is unlawful, as it prohibits the Regional Director from respecting the clear command of Section 9(c) to investigate a decertification petition to determine whether a question concerning representation exists. Complaint at ¶¶ 29-33. As a result, Williams and Wunz argue, the Regional Director's Order Dismissing Petition "contravenes Section 9(c)'s plain meaning,

which places an affirmative duty on the NLRB to investigate a decertification petition." [Doc. 1, ¶¶ 43-45].

But Williams and Wunz's argument fails from the start, because the Board *did* investigate the petition. The Region issued a Notice of Representation Hearing, reviewed the parties' Statements of Position, issued a Show Cause Order, and carefully reviewed the parties' responses. [Doc. 1-2, pp. 36-44]. Thus, what Williams and Wunz are really challenging is the manner by which the Region investigated the decertification petition, as well as the ultimate result reached by the Regional Director and upheld by the Board, to dismiss the petition because of the settlement bar. *See Surprenant Mfg. Co. v. Alpert*, 318 F.2d 396, 399 (1st Cir. 1963) (looking beyond complaint allegation that Subsection 9(c)(1) had been violated, to find plaintiff's "real contention" was that the Board had failed to apply the statute "in a proper manner").

Neither of these contentions is sufficient to create jurisdiction under *Kyne*. In a Third Circuit case decided more than fifty years ago, the court rejected a similar assertion of jurisdiction where the plaintiff alleged that the Board had violated Section 9(c) of the NLRA. In *Firestone Tire & Rubber Co.*, 365 F.2d at 628, the Board directed a second election after receiving evidence and determining the first election had been tainted by the employer's conduct. There, the employer argued that the Board violated Subsection 9(c)(3), which provides that a valid election constitutes a bar to a second election within 12 months, 29 U.S.C. § 159(c)(3). *Id*.

The Third Circuit noted that the wording of Section 9 leaves much to the Agency's discretion: "The Act does not, in terms, permit or deny a regional director the authority to set aside a representation election." *Id*. Instead, the NLRB's Rules and Regulations permit the Regional Director to set aside an election when an employer has interfered with employees' free

choice. *Id*. Therefore, the Third Circuit rejected the application of *Kyne*; the NLRB's application of the election bar did not suffice to grant the Court jurisdiction. *Id.* A few years later, that court similarly rejected *Kyne*'s application where the plaintiff alleged that the Board's application of its contract bar was unlawful. *Confederated Indep. Unions*, 465 F.2d at 1141 ("District courts clearly lack jurisdiction to pass upon the appropriateness of the Board applying or waiving its 'contract bar' rule.").

Consistent with this Third Circuit case law, other circuits and district courts have also rejected *Kyne* jurisdiction where violations of Subsection 9(c)(1) have been alleged. In *Surprenant*, the First Circuit found no "'clear and mandatory' statutory limitation of the Board's powers . . . . What appellant is asking is that the district court, in effect, supplant the Board's expertise. This cannot be done." 318 F.2d at 399 (citations omitted). District courts have also explicitly held that the provisions of Subsection 9(c)(1) are not "sufficiently 'clear and mandatory' to fall within the exception engrafted by *Leedom v. Kyne* because of the discretion and leeway vested in the Board in representation proceedings, and judicial and Congressional approval of the exercise of that discretion." *Nat'l Mar. Union*, 375 F. Supp at 432; *see also Nat'l Mar. Union v. NLRB*, 267 F.Supp. 117, 124 (S.D.N.Y. 1967) ("Section 9(c)(1) is by no means so clear and specific that when the Board declines to assert its authority it is acting in defiance of an express statutory command, thereby vesting this court with jurisdiction to review its action."). Williams and Wunz's failure to demonstrate the violation of a clear and mandatory provision of the NLRA is thus fatal to their case. *See MCorp*, 502 U.S. at 43-44.

B. In any event, the NLRB's actions complied with the requirements of Section 9

While Section 9(c) of the NLRA does not provide a "clear and mandatory" directive sufficient to invoke the *Kyne* exception, the Regional Director's actions, in fact, fully complied

with the procedure set forth in Section 9. As noted above, when a decertification petition is filed, the NLRB is directed to (1) "investigate such petition," and (2) if the Regional Director "has reasonable cause to believe that a question of representation affecting commerce exists [] provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c)(1)(B). Here, the Regional Director investigated the petition, and because that investigation revealed the presence of a settlement bar, a question concerning representation could not exist.[6]

The Supreme Court and lower courts have consistently approved the Board's authority to create doctrinal bars to elections.[7] In *Auciello Iron Works, Inc. v. NLRB*, the Supreme Court explained that the contract bar furthers "the need to achieve stability in collective-bargaining relationships." 517 U.S. 781, 786 (1996) (quotation omitted). Such election bars "address our fickle nature by enabling a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support." *Id.* (quotations omitted); *see also Brooks v. NLRB*, 348 U.S.

[6] Because the Regional Director investigated the decertification petition by issuing a Notice of Representation Hearing and an Order to Show Cause, and Williams and Wunz availed themselves of both opportunities to be heard, the Regional Director provided them with all the process they were due. Williams and Wunz's inartfully drafted due process allegations misstate the facts and serve only as a collateral attack on the NLRB's use of bars to elections. In short, their "alleged constitutional deprivation amounts to nothing more than disagreement with the manner in which the Board has exercised its judgment in the discretionary area of representation proceedings." *Nat'l Mar. Union*, 375 F. Supp. at 437. Nor can Williams and Wunz demonstrate that alleging a constitutional violation suffices to prove jurisdiction. *See Interstate Dress Carriers*, 610 F.2d at 107 (questioning the validity of such an exception). Thus, Williams and Wunz's factually and legally incorrect due process allegations should be dismissed.

[7] As such, Williams and Wunz's allegation that the Board-created settlement bar is "outside of the powers Congress delegate[d] to [the Board]" and thus in violation of the separation of powers and the nondelegation doctrine [Doc. 1, ¶¶ 55-60], fails for the same reasons.

96, 104 (1954) (affirming certification bar as "within the allowable area of the Board's discretion in carrying out congressional policy").

The Third Circuit and other circuits have followed the Supreme Court's lead. *See Confederated Indep. Unions*, 465 F.2d at 1141 (the contract bar rule "has been recognized as appropriate" and is "a matter to be applied or waived within the discretion of the NLRB");[8] *La Plant v. McCulloch*, 382 F.2d 374, 375 (3d Cir. 1967) (affirming the NLRB's dismissal of a decertification petition pursuant to the unfair labor practice bar). And as the Second Circuit explained, such doctrinal bars create an "insulated period [that] give[s] collective bargaining time to produce results and promote stability in industrial relations." *NLRB v. All Brand Printing Corp.*, 594 F.2d 926, 929 (1979) (discussing the validity and purpose of the settlement bar); *see also Bishop v. NLRB*, 502 F.2d 1024, 1029 (5th Cir. 1974) (affirming NLRB's use of the blocking charge rule to dismiss a decertification petition); *NLRB v. Commerce Co.*, 328 F.2d 600, 601 (5th Cir. 1964) (affirming the Board's reliance on unfair labor practice settlement bar to dismiss a decertification petition); *Surprenant Mfg. Co.*, 318 F.2d at 397 (affirming use of blocking charge doctrine to declare election null and void).

Because Williams and Wunz have not shown a violation of the NLRA, much less a violation of a clear and mandatory provision of the NLRA, *Kyne* jurisdiction cannot exist.

[8] Congress' enactment of Section 8(f) of the NLRA in 1959 implicitly endorsed the contract bar doctrine by expressly excluding its use only in the construction industry where the "majority status of [a] labor organization has not been established [under Section 9(a)] prior to the making of [the collective bargaining] agreement." 29 U.S.C. § 158(f). *See Techno Construction Corp. and Janco Contracting Corp.*, 333 NLRB 75, 81 (2001) ("During its term, an 8(f) contract will not act as bar to petitions pursuant to Section 9(c) or (e)"). Congress thus tacitly approved its use in all other contexts.

III. Statutes Conferring General Federal Question Jurisdiction Do Not Overcome Congress's Limitations on Judicial Review of NLRB Proceedings

Williams and Wunz assert that this Court has jurisdiction over this matter under the general jurisdictional provisions of 28 U.S.C. 1331 and 1337, as well as the APA, 5 U.S.C. §§ 702, 704, and 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. [Doc. 1, ¶ 1]. None of these statutes, however, confer district court jurisdiction when the NLRA precludes its existence. "[W]hen Congress designates a forum for judicial review of administrative action, that forum is exclusive." *Louisville & Nashville R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983) (citing *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965)).

Section 1331 and 1337 are general jurisdictional statutes. Section 1331 gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Section 1337, in relevant part, provides district courts with jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce." 28 U.S.C. § 1337. These provide no exception to long-settled limitations on judicial review of NLRB proceedings.

General jurisdiction does not obtain where a special statutory review procedure indicated "that Congress intended that procedure to be the exclusive means of obtaining judicial review." *Cost Control Mktg. & Mgmt., Inc. v. Pierce*, 687 F. Supp. 148, 151 (M.D. Pa. 1987), *aff'd*, 848 F.2d 47 (3d Cir. 1988); *accord Comp. Dep't of Dist. Five, United Mine Workers v. Marshall*, 667 F.2d 336, 340 n.7 (3d Cir. 1981); *see also, e.g., Owner-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner*, 931 F.2d 582, 589 (9th Cir. 1991); *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989); *Louisville & Nashville R. Co.*, 713 F.2d at 1245.

Williams and Wunz fare no better by invoking Sections 702, 704, and 706 of the APA. Section 701 specifically excludes the APA's application where "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). The Supreme Court has explicitly "conclude[d] that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano*, 430 U.S. at 107; *see also Local 542, Int'l Union of Operating Engineers v. NLRB*, 328 F.2d 850, 854 (3d Cir. 1964) (finding that the APA "is clearly remedial and not jurisdictional" and contains nothing "which extends the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence.").[9] Finally, the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, is equally unhelpful to Williams and Wunz, because it "is not an independent source of federal jurisdiction." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960).

Because Williams and Wunz have not satisfied their burden to demonstrate subject matter jurisdiction, this Court must dismiss.

IV. Williams and Wunz's Claim Will Be Moot No Later Than April 6, 2019

Article III of the United States Constitution permits federal courts to adjudicate "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). Once an event occurs that makes it impossible for the court to grant any meaningful relief to a prevailing party, the case must be dismissed as moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992).

[9] Additionally, the APA does not apply to representation cases, which are specifically exempted from its requirements. 5 U.S.C. § 554(a)(6); *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1253 (9th Cir. 1979); *NLRB v. Champa Linen Serv. Co.*, 437 F.2d 1259, 1262 (10th Cir. 1971); *NLRB v. Clement-Blythe Companies*, 415 F.2d 78, 82 (4th Cir. 1969) (APA exemption of the certification of worker representatives "applies not only to the proceedings before the Regional Director, but also to the Board's grant or denial of review of the Regional Director's decision.").

Though this case is not moot at this moment, it will become so in approximately two months' time. On April 6, 2019, the settlement bar at issue will expire, and "there is no reasonable likelihood that the alleged harm will occur again to the same complaining parties." *Rendell v. Rumsfeld*, 484 F.3d 236, 241 (3d Cir. 2007). Williams and Wunz will be able to file a decertification petition, and the Regional Director will once again investigate whether there is a question concerning representation, this time without any settlement bar. *See Furrs, Inc. v. NLRB*, 350 F.2d 84, 86 (10th Cir. 1965) (acknowledging that dismissal of a petition pursuant to the unfair labor practice bar is no bar to the filing a new petition after the unfair labor practice charges are resolved); *La Plant*, 382 F.2d at 375 (same). Therefore, should the Court not have occasion to decide this case prior to April 6, 2019, it should dismiss the case on that date for mootness.

CONCLUSION

For the reasons stated above, this Court lacks jurisdiction to review the NLRB's decision to dismiss Williams and Wunz's decertification petition. Accordingly, the Court should deny the requested relief and dismiss the Complaint.

Respectfully submitted,

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Dated: January 29, 2019
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Dismiss, Brief in Support, and Proposed Order were filed by the Court's CM/ECF filing system, thereby providing service to counsel for Plaintiffs.

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